

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

DEC 12 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2008-0079
Appellee,)	2 CA-CR 2008-0080
)	(Consolidated)
v.)	DEPARTMENT B
)	
JAMES ANTHONY TEMBY,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Appellant.)	Rule 111, Rules of
)	the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20033887 and CR-20034070

Honorable Christopher C. Browning, Judge

AFFIRMED

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Following appellant James Temby's guilty plea to four counts of second-degree burglary stemming from two separate indictments, the trial court suspended the

imposition of sentence and placed Temby on five years' probation. The probation department subsequently petitioned to revoke Temby's probation, alleging three violations of the conditions of probation. After a contested revocation hearing, the court found all three alleged violations proven but continued Temby on probation, determining that he had "an excuse" for two of the three violations. These consolidated appeals followed.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), avowing he has reviewed the entire record and found "no tenable issue to raise on appeal." He has also complied with *State v. Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d 89, 97 (App. 1999), by including "a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." Temby has not filed a supplemental brief.

¶3 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety and are satisfied it supports counsel's recitation of the facts. Viewed in the light most favorable to upholding trial court's decision, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence at the revocation hearing established that Temby had changed his residence without obtaining prior approval from the probation department, had consumed alcohol, and had failed to comply with the jail's work furlough program, all in violation of the conditions of his probation. Temby testified, however, that he had left the state to live with his grandmother in California because he had been told to do so by a Border Patrol agent after Temby had been taken into custody and released by the

Immigration and Naturalization Service. The trial court determined that, “given the color of law attendant to the Border Patrol officer’s statements to [Temby], . . . his reliance on th[em] was not unreasonable.” *See State v. O’Meal*, 116 Ariz. 307, 309, 569 P.2d 249, 251 (App. 1977) (defendant’s mental state at time of probation violation relevant to disposition). Temby offered no excuse, however, for his having consumed alcohol as alleged in count two of the petition for revocation.

¶4 We find no error warranting reversal and therefore affirm the trial court’s disposition order continuing Temby on probation.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge